(1) 83-1944

No._____

In The
Supreme Court of the United States
October Term, 1983

HOLLY JENSEN, Director and
WILLIAM J. EDWARDS, Deputy Director,
Department of Motor Vehicles, State of Nebraska,

Petitioners,

vs.

FRANCES J. QUARING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a statutory requirement of a photographic driver's license infringes on the respondent's free exercise of religion.

2. Whether the State's compelling interest in a photographic driver's license outweighs any incidental burden on the respondent's free exercise of religion.

3. Whether there exists a less restrictive alternative to the requirement of a photographic driver's license.

4. Whether the judicially created exemption for the respondent of the photograph requirement, based solely on religious grounds, contravenes the Establishment Clause of the First Amendment.

PARTIES

Application has been made pursuant to Rule 40.3 for the substitution of Holly Jensen as a petitioner to replace Harry "Pete" Peterson, a petitioner in the lower courts.

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The opinion of the District Court for the District of Nebraska, No. CV82-L-346, slip opinion (D.Neb. October 15, 1982), appears as Appendix A. The opinion of the Court of Appeals, 728 F.2d 1121 (8th Cir. 1984), appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 1, 1984, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §125[illegible]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Constitution of the United States

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

2. Neb.Rev.Stat. §60-406.04 (1982 Supp.), Appendix C.

STATEMENT OF THE CASE

The respondent, Frances J. Quaring, sought a Nebraska driver's license, but refused to have her photograph affixed thereto as required by Nebraska law. Neb.Rev. Stat. §60-406.04 (1982 Supp.) (App. C). She based her refusal on her literal interpretation of the Second Commandment which provides: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath or that is in the water under the earth." Exodus 20:4; Deuteronomy 5:8.

The respondent believes that the Second Commandment is violated by the taking of a photograph. She possesses no photographs of her family, does not own a television set, and refuses to allow decorations in her home depicting floral designs, animals or other creations in nature.

After the denial of respondent's application for a non-photographic license, respondent brought an action in the United States District Court for the District of Nebraska claiming a violation of her civil rights and alleging that the denial of her request infringed upon the free exercise of her religion in contravention of the First Amendment of the United States Constitution under 42 U.S.C. §1983 and 28 U.S.C. §1343.

The District Court found that the petitioner had shown two compelling state interests in public safety on streets and highways and security of financial transactions relative to the requirement of a photographic driver's license. However, it concluded that the creation of an exception, on religious grounds, would not pose an administrative burden of such a magnitude so as to render the entire statutory scheme unworkable. This conclusion was based on its reasoning that the requirement was not the least restrictive alternative available to the State. An injunction was issued prohibiting petitioners from refusing to grant the respondent a non-photographic driver's license.

The judgment was affirmed by a split decision in the United States Court of Appeals for the Eighth Circuit. It found that the photograph requirement constituted a burden on the free exercise of respondent's religious beliefs, and that the State's interest did not outweigh the burden imposed. It further found that the creation of an

exemption on religious grounds would not cause any undue administrative burden, nor would the exemption and accommodation of the respondent's religious beliefs contravene the Establishment Clause of the First Amendment. Judge Fagg, Circuit Judge, dissented, finding that the State's interest was of sufficient magnitude to justify an indirect burden on respondent's free exercise of religion, and that an accommodation for her would "unduly interfere with fulfillment of a government interest." *Quaring v. Peterson,* 728 F.2d 1121, 1128 (8th Cir. 1984).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With The Decision, On A Federal Question, Of A State Court of Last Resort And With Other Federal Courts On The Same Matter.

The Eighth Circuit Court of Appeals in this case has rendered a decision on a federal question directly in conflict with the decision of a state court of last resort and with other federal courts. In affirming the decision of the district court the Eighth Circuit stated:

> The Nebraska officials bring this appeal, arguing that 1) the statute requiring driver's licenses to contain a photograph of the licensee does not burden Quaring's exercise of her religion, 2) that even if the photograph requirement burdens her religion, the state's interests outweigh that burden, 3) that no less restrictive alternative would adequately serve the state's interests, and 4) that excepting Quaring from the photograph requirement on the basis of her religion would violate the establishment clause. We reject these arguments, and affirm the district court.

Quaring v. Peterson, 728 F.2d 1121, 1122 (8th Cir. 1984). This ruling is in direct conflict with *Johnson v. Motor Vehicle Division,* 197 Colo. 455, 593 P.2d 1363 (1979). The *Johnson* case was presented to this Court, but certiorari

was denied. 444 U.S. 885 (1979). Colorado, like Nebraska, requires a photograph on its driver's licenses. The Colorado Supreme Court rejected an identical challenge and upheld the requirement. It found that the state's compelling interest in photographic identification was an "indispensable underpinning of the purposes underlying the State's interest in issuing driver's licenses." 197 Colo. at 459, 593 P.2d at 1365. The plaintiffs in *Johnson* were members of the Assembly of YHWHHOSHUA, and also based their belief on a literal translation of the Second Commandment, the same position taken by respondent in the instant action.

The Colorado Supreme Court did not question either the religious nature of the belief or the plaintiff's sincerity, citing *United States v. Ballard,* 322 U.S. 78 (1944). The standard which the Court applied was that set forth in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." It noted, however, that "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." (*Johnson v. Motor Vehicle Division,* 197 Colo. at 457, 593 P.2d at 1364, citing *Braunfeld v. Brown,* 366 U.S. 599 (1961).)

Plaintiffs in *Johnson* relied on *Sherbert v. Verner,* 374 U.S. 398 (1963). In *Sherbert* a Seventh Day Adventist was discharged when she refused to work on Saturday because of her faith, which resulted in the denial of unemployment benefits. This Court held that such a denial was an impermissible infringement on the free exercise of religion which prevented the State from denying unemployment compensation.

The *Johnson* Court applied the "balancing test" set forth in *Sherbert*.[1] It found that although there was a burden on the free exercise of religion, the State's compelling interest was of such a magnitude so as to justify the burden. It further found that to provide exemptions would undermine the very purpose of the photograph requirement.

> . . . [O]nly a photograph can provide a police officer who makes a traffic stop with a ready and instantaneous means of determining that the person tendering the driver's license is indeed the person to whom the license was issued. . . . The exigencies of law enforcement cannot brook the delay inherent in other means of identification.

Johnson v. Motor Vehicles Division, 197 Colo. at 458-9, 593 P.2d at 1365.

The decision reached by the Eighth Circuit is directly contrary to that in *Johnson*. The court below agreed that Nebraska has an important State interest in quick and accurate identification of its motorists and in the security of financial transactions. However, it concluded that those interests are not sufficiently compelling so as to justify the State's denial of respondent's request for an exemption.

In justifying their refusal to grant Quaring an exemption to the photograph requirement, the Ne-

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[1]The balancing test in *Sherbert* sets forth three elements which must be weighed in determining whether a governmental interest "overbalances" the right to the free exercise of religion.

> "[F]irst, the importance of the secular value underlying the governmental regulation; second, the degree of proximity and necessity that the chosen regulatory means bears to the underlying value; and third, the impact that an exemption would have on the overall regulatory program."

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 Harv. L.Rev. 1381, 1390 (1967).

> braska officials advance several state interests. First, they point out that by ensuring that only persons with valid driver's licenses operate motor vehicles, the state promotes a compelling interest in public safety. *Cf. Delaware v. Prouse,* 440 U.S. 648, 659 (1978).
>
> . . . .
>
> Although quick and accurate identification of motorists surely constitutes an important state interest, we disagree with the Nebraska officials' contention that the state's interest is so compelling as to prohibit selective exemptions to the photograph requirement.

Quaring v. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984). The Eighth Circuit also rejected the argument that the creation of exemptions on religious grounds would constitute an administrative burden which would render the entire statutory scheme unworkable.[2]

The decision below is in accord with *Bureau of Motor Vehicles v. Pentecostal House,* 269 Ind. 361, 380 N.E.2d 1225 (1978). However, that case was not presented to this Court for review as was *Johnson. Cert. denied* 446 U.S. 885 (1979). The Indiana Supreme Court appeared

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[2]The Eighth Circuit implies that the record below is insufficient to support Nebraska's position that the creation of exemptions, solely on religious grounds would render the entire statutory scheme unworkable. However, the critical inquiry is the ability of the state to make *any* evaluation in this area. The difficulty in distinguishing truly religious objectors from those making false claims should weigh heavily in a judicial evaluation of the governmental interest at issue. This is compounded by the fact that any determination as to sincerity of belief in individual cases will frequently be arbitrary.

The court below characterized Quaring's belief as "unusual in the twentieth century . . .", a point the dissent deems significant. This Court has abandoned a narrow and conventional view of religion. However, the expansive treatment which has followed has made it exceedingly difficult and potentially more intrusive to evaluate an individual's belief. The invocation of undue administrative burden is particularly appropriate in this instance where there is also the broad possibility of error in assessing individual claims. Clark, *Guidelines for the Free Exercise Clause,* 83 Harv.L.Rev. 327 (1969).

to incorrectly elevate the privilege of obtaining a driver's license to that of a fundamentally protected right, and compared it to the situation addressed in *Sherbert*. "Clearly, the photograph requirement has placed the appellees in a dilemma requiring them to choose between violating an important religious principle or surrendering their driving privileges." *Bureau of Motor Vehicles v. Pentecostal House,* 269 Ind. at 367, 380 N.E.2d at 1228. The Eighth Circuit's decision is premised upon the same faulty assumption. "[I]n refusing to issue Quaring a driver's license, the state withholds from her an important benefit." *Quaring v. Peterson,* 728 F.2d at 1125. For reasons set forth in Part 2, petitioners urge that the Eighth Circuit's reliance on *Sherbert* is faulty and inappropriate, thereby rendering its precedential value meaningless to the extent it improperly addresses the *nature* of Quaring's interest in obtaining a driver's license.

The United States District Court for the District of Colorado has also ruled in accord with the Colorado Supreme Court in *Dennis v. Charnes,* 571 F.Supp. 462 (D. Colo. 1983). There, the plaintiff sought and was denied a non-photographic driver's license. The District Court sustained the defendant's motion to dismiss the plaintiff's complaint, which alleged a violation of the free exercise of religion and freedom to travel. Dennis was also a member of the Assembly of YHWHHOSHUA, and asserted his belief on a literal translation of the Second Commandment, as did the plaintiff in *Johnson* and the respondent herein.

The court in *Dennis v. Charnes,* stated that "to support a motion to dismiss, the State must show a compelling interest in having photographs on driver's licenses and there must be no alternatives available that would infringe less on First Amendment rights." *Id.* at 463, citing *Sher-*

bert v. Verner. The court concluded, as a matter of law, that the State had shown such an interest. It indicated that: "[P]hotographic identification is a central purpose for issuing drivers' licenses and exceptions would subvert that purpose." 571 F.Supp. at 464.

Therefore, it is necessary that this Court resolve not only two decisions of state courts of last resort, but the conflict between the Eighth Circuit in the instant case and the Colorado Supreme Court and a federal district court in Colorado. The diametrically opposite results on a federal question are exacerbated by the fact that Nebraska and Colorado are contiguous states. Such a proximate disparity in the treatment of a fundamental constitutional question demands a resolution by this Court.

II. The Decision Below Raises An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court; And The Decision Is In Conflict With Applicable And Related Decisions Of This Court.

(A) There Is No Burden On Respondent's Free Exercise Of Religion.

Both the district court and the Eighth Circuit relied heavily on *Thomas v. Review Board,* 450 U.S. 707 (1981). In *Thomas* this Court considered whether a state's denial of unemployment compensation benefits to a Jehovah's Witness, who voluntarily terminated his job because of his religious belief, constituted a violation of his First Amendment right to the free exercise of religion. It was held that the denial of these benefits constituted a violation of the free exercise clause of the First Amendment. "Here, as in *Sherbert,* the employee was put to a choice between fidelity to religious belief or cessation of work; ..." 450 U.S. at 717.

The extension of judicially created exemptions, on religious grounds, from the application of state statutes

has been controversial and sharply debated. *United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Board*, 450 U.S. 707; *Wooley v. Maynard*, 430 U.S. 705 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398; *Abington School District v. Schempp*, 374 U.S. 203 (1963). A recent area of controversy has arisen in unemployment compensation or social welfare benefits. In *Sherbert*, (factually similar to *Thomas*), a Seventh-Day Adventist was discharged for her refusal to work on Saturday, her day of worship, and was denied unemployment compensation benefits. In holding that such a denial was an impermissible violation, this Court stated:

> This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." Everson v. Board of Education, 330 U.S. 1, 16.

Sherbert v. Verner, 374 U.S. at 410.

The critical threshold inquiry in this, as in every case, is whether or not there is an actual *burden* on the free exercise of religion. Repeated emphasis is placed upon the *coercive* impact on an individual to choose between adherence to his faith and the receipt of a public benefit.

> [T]he Court recognized with respect to Federal Social Security benefits that "[t]he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause" (citation omitted) . . . [C]onditions upon public benefits cannot be sustained if they so operate whatever their purpose as to inhibit or deter the exercise of First Amendment freedoms . . .
>
> Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal

> principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Id. at 405-406.

The element of coercion of action which is contrary to religious belief is basic to a free exercise claim. *Sherbert v. Verner,* 374 U.S. 398; *Thomas v. Review Board,* 450 U.S. 707; *Sequoyah v. Tennessee Valley Authority,* 480 F.Supp. 608 (E.D.Tenn 1979); *aff'd* 620 F.2d 1159 (6th Cir. 1980, *cert. denied* 449 U.S. 953 (1980); *Valencia v. Blue Hen Conference,* 476 F.Supp. 809 (D.Del. 1979). "An essential element to a claim under the free exercise clause is some form of governmental coercion of actions which are contrary to religious belief. (citations omitted) . . . This governmental coercion may take the form of pressuring or forcing individuals not to participate in religious practices." *Sequoyah v. Tennessee Valley Authority,* 480 F.Supp. 608.

The instant situation is markedly different from those involving coercion of action. Respondent's belief is based on a personal and literal interpretation of the Second Commandment which provides that "Thou shalt not make unto Thee any graven image, or any likeness of anything that is in Heaven above, or that is in the Earth beneath or that is in the water under the Earth." Exodus 20:4; Deuteronomy 5:8. Respondent is not a member of any organized religion, and the church that she occasionally attends does not subscribe to her particular belief. There is no indication that in the absence of a driver's license, she would not be able to secure alternate means of transportation, albeit inconvenient, or to attend church services or to practice her belief. It is well established that economic disadvantage or inconvenience is not sufficient to justify an exemption on religious grounds.

> [W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference, • • •

> Consequently, it cannot be expected, much less required that legislators enact no law regulating conduct that may in some way result in * * * disadvantage to some religious sects * * *. Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

Quaring v. Peterson, 728 F.2d at 1128-29, Judge Fagg, dissenting.

The Eighth Circuit concedes that "the Nebraska officials correctly point out that the photograph requirement in no way compels Quaring to act in violation of her conscience." 728 F.2d at 1125. However the court below then concludes that "a burden upon religion exists when 'the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, * * * thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.,* citing *Thomas.*

The choice presented to the respondent is whether to violate her belief and allow herself to be photographed or to forego the privilege of obtaining a driver's license. The requirement of a photograph in no way interferes with her actions or the practice of her belief. "[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." *Braunfeld v. Brown,* 366 U.S. at 603 (1961).

The importance of the federal question involved, *i.e.,* accommodation of respondent's claim solely on the basis of religion, is further enhanced by the fact that 47 states now require photographic driver's licenses. This is not an isolated case, and its ramifications will have national significance. Such a situation creates a conflict which this Court can and should resolve. *People of New York v. O'Neill,* 359 U.S. 1 (1959); *McGee v. International Life Insurance Company,* 355 U.S. 220 (1957).

The rationale utilized by the Eighth Circuit's reliance on *Thomas* and *Sherbert* is preliminarily and fatally flawed. Further, it is not in accord with apposite decisions of this Court and other federal courts regarding the most elemental analysis of the questions presented. In its assessment of the burden on respondent's free exercise of religion, the majority, citing *Thomas,* states:

> [I]n refusing to issue Quaring a driver's license the state withholds from her an important *benefit.* Quaring needs to drive a car for numerous daily activities, which include managing a herd of dairy and beef cattle, helping her husband manage a thousand-acre farming and livestock operation, and working as a bookkeeper in a community ten miles from home. By requiring Quaring to comply with the photograph requirement, the state places an unmistakable burden upon her exercise of her religious beliefs.

(Emphasis added.) 728 F.2d at 1125. The lower court further finds the burden on respondent to be *indistinguishable* from the burden placed upon the Sabbatarian in *Sherbert.* It is this rudimentary error in defining the burden on respondent which, of necessity, invalidates the remainder of the lower court's analysis and conclusions.

The Eighth Circuit has ignored previous pronouncements of this Court and other federal courts concerning the *nature* of the interest involved—the ability to drive an automobile. The faulty premise entertained is that there is a fundamentally protected *right* to drive an automobile. While this Court has held that there is a protectable property interest in a driver's license (*once granted*) to the extent that it may not be revoked or suspended without due process guarantees, it is evident that the nature of the interest at stake is an important consideration in determining the *level of protection afforded.* "Accordingly, . . . consideration of what procedures due process may require under any given set of circumstances must begin

with the determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action." *Goldberg v. Kelley,* 397 U.S. 254, 263 (1970). *See also, Dixon v. Love,* 431 U.S. 105 (1977); *Bell v. Burson,* 402 U.S. 535 (1971).

It is elemental that if respondent has no fundamental right to drive, there can be no burden on the free exercise of her religiou caused by the denial of a nonphotographic driver's license. Both *Sherbert* and *Thomas* dealt with the receipt of public welfare *benefits.* This Court has clearly distinguished such interests from the instant case.

> [A] driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence . . . . We therefore conclude that the nature of the interest here is not so great as to require us "to depart from the ordinary principle, established by out decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action."

Dixon v. Love, supra, at 113.

The Second Circuit has specifically held that there is no fundamental right to a driver's license. In a suit challenging the constitutionality of a Vermont statute providing for the suspension of the right to drive of persons who have not paid the automobile purchase and use tax assessment, the court found that the plaintiff needed to be able to "drive to visit the doctor, shop for groceries, and attend to other details of family life. No other member of his household holds a driver's license." *Wells v. Malloy,* 402 F.Supp. 856, 858 (D.Vt. 1975), *aff'd* 538 F.2d 317 (2d Cir. 1976). In rejecting a strict scrutiny test in response to an alleged equal protection argument, the court noted: "In this instance there is no fundamental right. Although

a driver's license is an important property right in this age of the automobile, it does not follow that the right to drive is fundamental in the constitutional sense." *Id.* at 858. *See also, Montgomery v. North Carolina Department of Motor Vehicles,* 455 F.Supp. 338 (W.D.No.Car. 1978), *aff'd* 599 F.2d 1048 (4th Cir. 1979); *Perez v. Tynan,* 307 F.Supp. 1235 (D.Conn. 1969).

It is patently clear that the state's *grant* of a driver's license carries with it the concomitant ability of the state, through its police power, to place whatever reasonable restrictions it wishes on its issuance and use.

> Although the privilege might be a valuable one, it is no more than a permit granted by the state, with its enjoyment depending upon compliance with prescribed conditions and always subject to such regulation and control as the state may deem necessary to preserve the safety, health and morals of its citizens.

Ogren v. Miller, 373 F.Supp. 980, 982 (W.D.Ky. 1973). The court in *Ogren* specifically pointed out that even if the right to drive were a property right, it would still be subordinate to the state's right to regulate and control its issuance and use. "The Commonwealth, in the exercise of its legislative wisdom, through its police powers, can delineate any reasonable limitations it wishes in bestowing the privilege." *Id.* at 982.

Absent the involvement of a fundamental right, Nebraska's requirement of a photographic driver's license must only bear a rational relationship to the statute's objective. *Wells v. Malloy,* 402 F.Supp. 856 (D.Vt. 1975), *aff'd* 538 F.2d 317 (2nd Cir. 1976). This was met in the lower court's specific finding that quick and accurate identification of motorists and security of financial transactions serve important state interests. In that there is no

right to drive, the inquiry should have proceeded no further. "[W]e may take it as settled that such a right, federal or state, does not exist." *Raper v. Lucey,* 488 F.2d 748, 751 (1st Cir. 1973).

This Court has noted the critical distinction to be drawn between *Thomas* and *Sherbert* and other situations presented to it for review. In *United States v. Lee,* 455 U.S. 252 (1982), a case involving the imposition of social security taxes upon members of the Amish sect, Justice Stevens in his concurrence noted the tension between *Lee* and the situations presented in *Sherbert* and *Thomas.* "Arguably, however, laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability." *Id.,* n. 3, pp. 263-64, Therefore, this Court's findings in *Thomas* and *Sherbert* should be viewed as a reaction to *disparate* treatment because of religious views as opposed to the grant of *favored* treatment for the members of a particular religious sect. *Id.*

If one examines the instant case in view of the *nature* of the interest involved, i.e., the "right to drive," the inescapable conclusion must be that the question of a *burden* on the free exercise of religion never arises. We have no coercion of actions contrary to belief. We do have the forbearance of driving an automobile as an accommodation to respondent's belief. However, that personal decision on her part in no way requires a First Amendment analysis in the judicial sense. The state must only show a rational relationship between the photograph requirement and a legitimate state purpose. In that not one, but two, *compelling* interests were demonstrated, both lower courts erred in allowing the inquiry to proceed beyond this elemental determination.

(B) The State's Compelling Interest Outweighs Any Incidental Burden On Respondent's Free Exercise Of Religion.

Assuming arguendo that respondent's free exercise of religion is burdened, the lower court's decision is also in conflict with this and other federal court decisions regarding the state's compelling interest in ready and instantaneous identification of regulated individuals, including licensed drivers. *Dennis v. Charnes,* 571 F. Supp. 462; *United States v. Lee,* 455 U.S. 252; *Johnson v. Motor Vehicle Division,* 593 P.2d 1363; *Forbush v. Wallace,* 341 F.Supp. 217 (M.D. Ala. 1971); *Goldberg v. Kelley,* 397 U.S. 254.

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, . . . but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." . . .
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> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 259-261.

Free exercise claims have been raised against the requirement and/or utilization of social security numbers. These numbers serve an important and compelling state interest in identification—a similar, if not the same, purpose served by photographic driver's licenses. In *Calla-*

han v. Woods, 559 F. Supp. 163 (N.D. Cal. 1982), the court found, on remand from the Ninth Circuit (after the decision in *Thomas*), that the indirect burden "is heavily outweighed by the government's compelling interest in requiring each aid recipient to have a SSN, and the Court further holds that this is the least restrictive means of achieving its all-compelling interest in administrative viability of administering the enormous social security program, . . ." *Id.* at 164.[3] The court in *Callahan* relied on *United States v. Lee*, for the proposition of a compelling interest in the administrative viability of the system. A similar argument was set forth by Judge Fagg in his dissent in the instant case.[4]

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[3]On Appeal, the Ninth Circuit has again remanded this case for a determination of the cost of exempting Callahan from the SSN regulation. Callahan v. Woods, No. 83-1688, slip opinion (9th Cir. March 30, 1984).

[4] Nebraska's photographic license requirement advances the state's interest in public safety on the streets and highways by providing police officers in the field with an accurate and instantaneous means of identifying motorists. Significantly, a police officer arriving at the scene of an accident or stopping a vehicle in connection with a traffic violaton or suspected criminal activity is assured that the individual displaying the license is in fact the individual to whom the license was issued. As noted in the majority opinion, the fact that 47 of the 50 states require a photographic driver's license indicates the unique advantage derived from this instantaneous identifier.

The majority does not attempt to advance any less restrictive means of accomplishing the state's compelling interest in internal "quick and accurate identification of motorists." Rather, the majority states that in weighing the competing interests involved, it is necessary to consider whether granting "selective exemptions" to the state's requirement would impair the state's ability to achieve its objective. This approach simply ignores or casts aside the state's legitimate interest in assuring instantaneous identification for all of its regular license holders. I am convinced that accommodation of Quaring's religious practice by issuance of a driver's license lacking a photographic

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The court in *Callahan* distinguished *Thomas,* finding it significantly different, "*Thomas* dealt with a requirement for eligibility for receipt of benefits . . . that constituted the substantive criteria for participation in a government program, but did not affect the fundamental administration of the system as a whole; . . ." The court also emphasized the unique identification value of a social security number finding that it is "necessary to enable the system to function." *Callahan v. Wood,* 559 F.Supp. at 169-170. An opposite result was reached in *Stevens v. Berger,* 428 F.Supp. 896 (E.D.N.Y. 1977). However, that decision appears to be based upon insufficiency of evidence presented on behalf of the state. *Mullaney v. Woods,* 158 Cal.Rptr. 902, 97 Cal.App.3d 710 (1979), used the same compelling state interest standard but ruled opposite *Stevens.* "The use of a number to identify each recipient of aid was intended to facilitate the administration of the vast, constantly growing, welfare programs. . . . The chief value of a system lies in its ability to apply uniformly to all within its scope, without exception." 158 Cal.Rptr. at 911-12, 97 Cal.App.3d.

Another instance of this Court's emphasis on identification is found in *United States v. O'Brien,* 391 U.S. 367 (1968), *rehearing denied,* 393 U.S. 900 (1968), a case dealing with criminal convictions for burning draft cards. In upholding these convictions, this Court stated that:

> The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the func-

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identifier would "unduly interfere with fulfillment of the governmental interest." *United States v. Lee,* 455 U.S. 252, 259 (1982). "The ready certainty inherent in photographic identification would be lost." *Johnson v. Motor Vehicle Division,* 593 P.2d 1363, 1365 (Colo. 1979).

> tioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

Id. at 377-378.

A free exercise claim was also denied in *Powers v. State Department of Social Welfare*, 208 Kan. 605, 493 P.2d 590 (1972). There an individual refused, on religious grounds, to submit to a medical exam as a prerequisite to the receipt of welfare benefits. In rejecting a free exercise claim, the court stated that:

> "A State acting through the police power may reasonably limit the free exercise of religion for the protection of society. Where the exercise of legislative power comes into conflict with the freedom of religion, the validity of legislation will depend upon the balance of the factors affecting the public interest. The individual cannot be permitted on religious grounds to be the sole judge of his duty to obey laws enacted in the public interest.

208 Kan. at 614, 493 P.2d at 597-598. As discussed previously, the compelling state interest in identification of licensed drivers has been found to outweigh any incidental burden on an individual's free exercise of religion. *Johnson v. Motor Vehicle Division*, 593 P.2d 1363 and *Dennis v. Charnes*, 571 F.Supp. 462. It is evident that the state's interest in instantaneous identification of its licensed drivers and in the security of financial transactions outweighs any alleged incidental infringement on respondent's free exercise of religion. "[T]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S.

at 606, cited in *Thomas v. Review Board,* 450 U.S. 722. Further, the compelling interest of the state is directly related to the safety and welfare of its citizens in general. The ability of a state to limit the free exercise of religion is appropriately given in instances which involve such matters. *Sherbert v. Verner,* 374 U.S. 398; *Thomas v. Collins,* 323 U.S. 516 (1945).

(C) There Are No Less Restrictive Alternatives To The State's Requirement Of A Photographic Driver's License.

Petitioners are of the firm conviction that the court's inquiry should have ceased upon the determination that no burden existed on respondent's free exercise of religion. Therefore, any discourse regarding the availability of least restrictive alternatives is superfluous. However, for sake of argument, petitioners would urge that the lower court's judicially mandated exemption, solely on religious grounds, presents insurmountable and impermissible obstacles to the state's implementation of such a system. In reality, less restrictive alternatives are almost always available, provided that the state is willing to sacrifice effectiveness. It is not clear what role the concept of "least restrictive alternatives" plays in First Amendment jurisprudence. Courts can frequently decide cases which raise First Amendment questions without appealing to the less drastic means test (the position urged by petitioners herein for the reason that the court's inquiry was complete upon an examination of the alleged burden on respondent's free exercise of religion). However, most cases are decided on a balancing test of the conflicting values and interest.

> Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power

> of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. at 377. *See also*, Note: Less Drastic Means and the First Amendment, 78 Yale Law Journal 464 (1969).

The Eighth Circuit indicates that the denial of a non-photographic license to the respondent does not represent the least restrictive means available to accomplish this state's objective. It is unclear in the lower court's opinion, as well as in other case law, what showing is necessary by the government to prove that no other alternative is feasible. It was the testimony of Colonel Kohmetscher, Superintendent of the Nebraska State Patrol, that no other means of identification was an effective alternative to the photographic driver's license. Additionally, it is obvious that the administration of applications for exemptions would be cumbersome, costly, and would very likely result in disparate treatment. In that instance, the government's compelling interest should not be compromised on the basis of an alleged incidental infringement on respondent's belief, particularly when that infringement in no way interferes with the exercise or practice of respondent's religion, or coerces to her act in a manner inconsistent with her belief.

Perhaps of greater significance is the impropriety of having Nebraska officials determine, on a case-by-case basis, with no guideline whatsoever from the court, the religiosity and sincerity of individual belief. While asserting the ease with which this can be accomplished, the court below has apparently ignored the dangerous arena

into which Nebraska's administrators have been thrust. The situation is compounded by the very nature of the inquiry which would be necessary in order to determine whether or not an exemption should be granted on religious grounds. In the early case of *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court expressed a grave concern that government officials ought not have the capacity to determine whether or not certain causes are religious in nature. The issue in *Cantwell* was the certification of those soliciting on religious grounds.

> It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is *empowered to determine whether the cause is a religious one*, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

(Emphasis added.) *Id.* at 305. This Court further distinguished between those actions by a government agent which are ministerial as opposed to discretionary. In the event that a government official exercises discretion in determining the *religious nature* of a cause, his actions constitute a prior restraint and lay a forbidden burden upon the exercise of liberty protected by the Constitution. It is axiomatic that governmental questioning of the truth or falsity of beliefs is proscribed the First Amendment. Further, the difficulty of an investigation of an applicant

for an exemption is seriously compounded when the relevant belief does not, on its face, fit any generally recognizable religious framework. *Stevens v. Berger*, 428 F. Supp. 896.

The Eighth Circuit has, in essence, required Nebraska officials to exercise their discretion in determining whether or not an applicant's request for an exemption is based on religious grounds. Conceding that respondent's beliefs are "unusual in the twentieth century", the lower court has failed to address the impossibility, much less the impropriety, of forcing administrative officials to perform this task.

(D) The Judicially Mandated Exemption Is In Violation Of The Establishment Clause Of The First Amendment.

The mandated exemption for respondent from the photograph requirement is also in direct conflict with pronouncements from this Court regarding violations of the Establishment Clause of the First Amendment. As most recently stated in *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984):

> The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

104 S.Ct. at 1362, citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Justice Stewart, in his concurrence in *Sherbert* expressed grave concerns as to the violation of the Establishment Clause in holding that unemployment benefits could not be denied based upon the claimant's refusal to work on Saturdays.

> The Court says that South Carolina cannot under these circumstances declare her to be not "available for work" within the meaning of its statute because to do so would violate her constitutional right to the free exercise of her religion.
>
> Yet what this Court has said about the Establishment Clause must inevitably lead to a diametrically opposite resut. If the appellant's refusal to work on Saturdays were based on indolence, or on a compulsive desire to watch the Saturday television programs, no one would say that South Carolina could not hold that she was not "available for work" within the meaning of its statute. That being so, the Establishment Clause as construed by this Court not only *permits* but affirmatively *requires* South Carolina equally to deny the appellant's claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed.

Sherbert v. Verner, 374 U.S. at 414-415.

These same concerns were raised in *Thomas v. Review Board,* 450 U.S. 707. Justice Rehnquist in his dissent focused on the growth of social welfare legislation during the latter part of the 20th Century. In his opinion, this growth has greatly magnified the potential conflict between the two Clauses. "The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment." *Thomas v. Review Board,* 450 U.S. at 722. Recently, in *United States v. Lee,* Justice Stevens in his concurrence, noted that:

> [T]he principle reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one

> religion over another is an important risk the Establishment Clause was designed to preclude.

455 U.S. at 263, n.2.

The decision below falls squarely within the ambit of the concerns raised above. The Eighth Circuit effectively required the state to make an exception *solely* on the basis of a claimant's religion. Necessarily, the state must then determine the "religiosity" of the claim, a delicate if not impermissible task. An analogy can be drawn between the instant situation and that presented in *Yott v. North American Rockwell Corporation*, 428 F.Supp. 763 (C.D. Cal. 1977). The constitutionality of a particular statute was at issue which required employers to make reasonable accommodations respecting religious observances and practices. The court pointed out that religious freedom and secular governmental approach to religious institutions are guaranteed by the First Amendment.

> The First Amendment allows no such choice. Government simply cannot make the choice—termed reasonable or otherwise—that conduct which lacks either discriminatory intent or discriminatory application can be circumscribed because religious beliefs may oppose its implementation. Faced with such a decision government must declare its neutrality. That neutrality may result in a sacrifice from the individual who adheres sincerely to his religious beliefs. Such sacrifice is, however, self-imposed with the rewards being measured outside our temporal ken. (citations omitted).

Id. at 767.

The decision of the court below is in direct contravention of the purposes of the Establishment Clause. Interpretations of the Clause may vary. But, whatever historical position one takes concerning the development of the Free Exercise Clause and the Establishment Clause,

the mandate of the Constitution remains viable. "The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." Kurland, *Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court,* 24 Villanova Law Review 3 (1978) at 24. The finding of the lower court is that the state is *compelled* to grant an exemption based solely on a claimant's religious belief. The Establishment Clause, of necessity, proscribes the granting of an exemption or the conferring of a benefit based entirely upon the religiosity of the claim when the interference with the claimant's belief is incidental, and there is no element of coercion as required by *Sherbert* and *Thomas.* Nor is the respondent's desire to have a driver's license deserving of such treatment.

Given this Court's differing views of the application of the Establishment Clause, and given the need to define the *nature* of the interest involved in the instant situation, the issue presented is ripe for adjudication. The expansion of free exercise guarantees has been in the area of denial of benefits of otherwise available public welfare legislation. The incidental infringement upon respondent's belief is insufficient to extend the grant of an exemption, based solely upon religious grounds, to respondent's request for a nonphotographic driver's license. As pointed out by Judge Fagg in his dissent:

> I have no quarrel with the majority's observation that Quaring may experience daily inconvenience because she cannot drive a motor vehicle. Her difficulties, however, are not insurmountable and she is not the only person that has been faced with the need to make life-style adjustments precipitated

> by nonconformity with driver's license requirements. Not insignificantly, and as the majority notes, Quaring's religious beliefs are "unusual in the twentieth century" and "the photographic requirement in no way compels Quaring to act in violation of her conscience." I cannot say that the state's legitimate requirement of a photographic identifier has placed impermissible pressure on Quaring to modify her behavior and violate her beliefs to the end of obtaining driving privileges upon the roadways of Nebraska.

728 F.2d at 1128.

While the Eighth Circuit went to great lengths to establish the sincerity and centrality of respondent's belief, these attributes alone are insufficient to support the exemption under existing constitutional precepts. The decision and its reliance upon inapposite case law is supportive only of a means to a desired end. However, sympathetic the court may be towards the respondent, the clear mandate of the First Amendment precludes the carving out of an exemption to a constitutional statute based solely on her individualized belief. Regardless of the desirability or equitable nature of the result, the decision below flies squarely in the face of constitutional mandates.

CONCLUSION

Perhaps the clearest reason for this Court to grant certiorari in the instant case is the fact that the decision of the court below is in direct conflict with the Supreme Court of Colorado as well as with a federal district court in the Tenth Circuit. *Johnson v. Motor Vehicle Division*, 593 P.2d 1363; *Dennis v. Charnes*, 571 F.Supp. 462. Of great significance is the fact that 47 other states share a like requirement of a photographic driver's license. The inconsistency and uncertainty which will result is of prime

importance in petitioning this Court for a resolution of an important federal question. It is also necessary to define the scope and extent to which this Court will embrace claims regarding the free exercise of religion.

Although petitioners have treated several aspects of the decision of the court below, petitioners place great emphasis on the fact that the court below erred in its preliminary determination that a *burden* existed at all upon the respondent's free exercise of religion. The initial faulty assumption that the ability to drive an automobile is a fundamentally protected right or is equivalent to public welfare benefits discredits the entire opinion. The comparison to *Thomas* and *Sherbert* and the extension of the rationale therein is not only unsupported, but violates the Establishment Clause of the First Amendment. The confusion resulting from the disparity between the Eighth and Tenth Circuits is compounded by the lower court's insensitivity to the state's compelling interest in instantaneous identification of its licensed drivers.

It is interesting to note that the trial court, as well as the Eighth Circuit observed that the photograph requirement in no way compels respondent to act in violation of her conscience. As stated previously, one of the fundamental inquiries is the *coercion of action* contrary to belief. Such an element is basic to a free exercise claim. The absence of coercion is therefore supportive of the argument that no burden exists on respondent. Given the disparity of decisions below, and the inapposite treatment of existing case law, petitioners respectfully urge that this Court grant the petition for certiorari to resolve the questions presented herein.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-346

FRANCES J. QUARING,

Plaintiff,

vs.

HARRY "PETE" PETERSON, Director of the Deparment of Motor Vehicles, State of Nebraska; WILLIAM EDWARDS, Deputy Director of the Department of Motor Vehicles, State of Nebraska,

Defendants.

MEMORANDUM AND ORDER

(Filed October 15, 1982)

I.

This lawsuit has been brought by Frances J. Quaring against the director and deputy director of the Department of Motor Vehicles of the State of Nebraska under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, alleging a deprivation of her right to the free exercise of religion. A hearing on the plaintiff's request for a preliminary injunction was held on August 13, 1982, and by consent of the parties the hearing will comprise the trial on the merits.

The plaintiff's complaint is occasioned by the requirement contained in § 60-406.04, R.R.S. Neb. (Supp. 1981), that all motor vehicle operators' licenses issued in the State of Nebraska, with exceptions not applicable to the plaintiff, contain a color photograph of the licensee. The plaintiff takes issue with this requirement because of her religious beliefs concerning prohibitions of photographs. She testified at the trial that her beliefs regarding the

prohibition of graven images contained in Exodus 20:4 and Deuteronomy 5:8 of the Bible, known to some as the Second Commandment, prohibit her from being photographed for the license. Because of the absence of a statutory exception allowing the plaintiff to receive an operator's license without a photograph, she has been unable to receive a current license.

The plaintiff testified concerning the exact nature of her beliefs relating to photographs. Under her interpretation of the Second Commandment, she is prohibited by God from having any sort of likeness of things created by God. She believes the prohibition to be so broad-reaching as to require that she possess no photographs, paintings, floral-designed clothing, drapes or carpeting, or drawings that would contain a likeness of items in creation. When she purchases foodstuffs displaying pictures, she either removes the picture or obliterates it with a black marking pen. She possesses no pictures of her wedding or of her children; no television is allowed in her home.

The plaintiff's beliefs come from a self-study of the Bible undertaken after a personal tragedy some years ago. Although she and her family have extensively studied the Bible for a number of years, they do not formally belong to any organized religious body. They attend a Pentecostal Church in Gibbon, Nebraska, but are not formally enrolled members. Occasionally, the plaintiff plays the piano for the Pentecostal Church at Gibbon. They also attend nondenominational Bible study groups. The plaintiff's beliefs are similar to those of the Pentecostal church members, although they differ with respect to the interpretation of the prohibition of graven images.

Many Pentecostals, according to the plaintiff, probably do not interpret the commandment as prohibiting the *possession* of all representations of things in creation; rather, the commandment prohibits the *worshipping* of images or idolotry. The effect of violating the commandment by allowing oneself to be photographed would, according to the plaintiff, be a transgression of the law of God, separating humans from God.

The sincerity and religiousness of the plaintiff's belief were addressed at trial by John Turner, a professor of religious study. He testified that the plaintiff's belief concerning photographs and other images is supportable as arising out of an understanding that the ancient Hebrew nation had concerning the remaking of items in creation, and that the plaintiff's beliefs can be analogized to the Hebrew concept that symbols are an attempt to capture God and His creations and that such an attempt is prohibited.

Dr. Turner also addressed the sincerity of the plaintiff's belief with respect to the need to be affiliated or formally enrolled in a recognized body corporate of individuals holding like religious beliefs. He stated that membership and association in a religious organization typically are not the same thing; membership involves a formal commitment to the group, while association may lack any particular commitment. Dr. Turner indicated that different branches of religious beliefs have varied views as to the significance of membership. Many western religions attach a high priority to enrolled membership. Others, particularly the more fundamentalists, such as the Pentecostal, attach a lowered significance to the formal enrollment vis-a-vis mere association.

The plaintiff has made several attempts to obtain a valid operator's license without a photograph. She had her Nebraska legislator contact the Department of Motor Vehicles in an attempt to obtain an exception, and the Nebraska State Ombudsman was contacted. After talking with individuals at the Department of Motor Vehicles, the plaintiff decided to take the examination to qualify for an operator's license and then seek an exception. She passed the examination, and she then applied to the Department of Motor Vehicles for an exception from the photograph requirement. The director of the department denied the application of June 3, 1982, because he could find no statutory or constitutional authority to grant an exception.

The inability to obtain a valid operator's license is of great concern to the plaintiff. The plaintiff and her husband operate a farming operation in Buffalo and Hall Counties, Nebraska, encompassing livestock and over one thousand acres of row crops. The plaintiff manages her own herd of dairy and beef cattle and needs to drive vehicles to do so. Her husband is unable to provide her with transportation, because he is occupied from early morning to late in the evening with other parts of the operation that are several miles from the plaintiff's herd. In addition, the plaintiff is employed as a bookkeeper in Gibbon, Nebraska—about ten miles from her rural residence—and needs transportation to that job.

Witnesses for the defendants testified as to the state's need for photographs on the licenses and the potential administrative burden of a religion exception to the photograph requirement. Elmer Kohmetscher, Superintendent of the Nebraska State Patrol, testified about

the use and value of photographic operator's licenses in law enforcement. The Nebraska operator's license contains both a physical description, detailing height, weight, eye color, hair color, sex and race of the licensee, and a color photograph. The laminated photographic license makes counterfeiting and transferring of licenses between individuals much more difficult. Prior to the requirement of a photograph, it was common for individuals to be able easily to counterfeit a license merely by altering physical descriptions. In addition, individuals with similar physical descriptions could trade licenses, making it difficult for law enforcement officials to ascertain readily the identity of the bearer of the license.

Photographs on the license provide not only a ready form of identification for law enforcement officials but also a fairly accurate means. Kohmetscher testified that individuals have unique facial features, distinguishing them from others. Once an officer has confirmed that the person depicted by the photograph on the license is the same as the person from whom he has requested identification, he is fairly certain of the accuracy of the identification.

Two of the defendants' witnesses, Wayne Green and William Morrissey, testified concerning the administrative details of the issuance of licenses and of a possible exception to the photograph requirement. Green, the chief license examiner, testified that county treasurers—not the Department of Motor Vehicles—are responsible for issuing the photographic license and for taking the photographs, performing this function with the guidance of a manual prepared by the Department. Once a treasurer issues a photographic license, one copy of the license

without the photograph is retained at the treasurer's office and one copy without a photograph is sent to the Department's central office. The only copy with a photograph stays with the licensee. The imposition of a religious exception to the photograph requirement would not vary the examination process, only the issuance process at the county treasurer's office.

Morrissey, the associate director of driver services for the Department, testified further about the guidelines sent to the county treasurers and the other types of permits which are issued without the requirement of a photograph. Morrissey felt that a religious exception to the photograph requirement would be difficult to handle. He pointed to the large volume of applicants processed in the Omaha and Lincoln metropolitan areas as illustrative of the problem. He stated that the written directives to county treasurers could be issued to detail the requirements for a religious exception, and that the decision as to whether a person may qualify for a religious exception to the photograph requirement could be administered by the Department of Motor Vehicles, thereby avoiding problems in crowded areas, such as Omaha and Lincoln, especially since at least in recent times there have been only one or two requests for such an exception.

Morrissey also testified concerning special permits that do not contain a photograph: school permits for farmers' children between the ages of fourteen and sixteen, farm machinery permits to allow farm children under sixteen to drive farm machinery, special permits for those with restricted or minimal driving ability, temporary licenses for individuals outside the state whose licenses have expired, and learners' permits for individuals

between the ages of fifteen and sixteen. Of all these special permits, only learners' permits have a significant number outstanding.

The legislative history of the photographic requirement sheds further light on the need for this requirement. At least four purposes were identified in the hearings before the Public Works Committee of the Nebraska Legislature. Substantial attention was given to the problems that had been encountered with counterfeiting the previous licenses. The need for photographic identification in traffic law enforcement was discussed as a second concern. A third concern was the problems encountered with the previous nonphotographic licenses and the sale of alcoholic beverages. Several individuals testified as to the problems of ascertaining the age of purchasers of alcoholic beverages without the aid of positive photographic identification. A fourth concern was the use of a driver's license for identification in financial transactions, particularly the use of the license when writing or cashing checks. See *Hearings Before the Public Works Committee, Nebraska Legislature,* 16-34 (1-26-77).

It seems that all four of the above concerns display an interest in public safety and security. The need to have accurate, unaltered identification when concerned with the identity of a driver of a vehicle on public streets is unquestionably related to the public safety and security. In addition, accurate identification aiding in the restriction of the sale of alcoholic beverages to minors furthers the public safety concern inherent in those restrictions. The state also has an interest in the security of private financial transactions, because it has offered its protection to private individuals against certain misuses

of financial instruments. See, e.g., §§ 28-512 (theft by deception), 28-602 to 28-603 (forgery), and 28-611 (issuing a bad check), R.R.S. Neb. (Reissue 1979).

II.

The plaintiff has challenged the photograph requirement of § 60-406.04, R.R.S. Neb. (Supp. 1981), as violative of her First Amendment right to exercise freely her religion. It is well settled that a sincerely held religious belief may give rise to First Amendment protection when a state seeks to compel a choice "between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Board*, 450 U.S. 707, 716 (1981). Even though a law does not discriminate on its face, it is invalid should it unduly burden the free exercise of religion through its application. *Id.*

The determination of whether the plaintiff's claim is one that should be afforded protection is twofold. First, there must be a determination that the belief, whatever the nature, is sincerely held. Second, the court must decide whether the belief is a religious one entitled to First Amendment protection. See *Stevens v. Berger*, 428 F. Supp. 896, 901 (U.S.D.C. E.D. N.Y. 1977).

I have no doubt that the plaintiff's belief is sincerely held. At trial the plaintiff appeared ready to support her interpretation of the Bible, based on her knowledge of several portions of the Old Testament. In addition, the plaintiff's behavior in every way conforms to the prohibition as she understands it: her home contains no photographs, television, paintings, or floral-designed furnishings, and, as she testified, she goes so far as to remove or obliterate pictures on food containers.

A further examination of her belief then is necessary to determine whether it is of a religious nature. It is possible to examine the nature of a belief based on either the content of it or the function it plays in the person's life. See Note, "Toward a Constitutional Definition of Religion," 91 Harv. L. Rev. 1056 (1978). Although the content-based tests appear to be in disfavor, compared to functional tests, I believe that under either line of reasoning the plaintiff's belief qualifies as a religious belief. Frequently, tests for the content of a religion focus on whether the particular belief rests on a defensible position taken with respect to theological traditions. See *Stevens v. Berger,* supra, 428 F. Supp. at 902-903. The plaintiff's belief concerning the prohibition of photographs has some grounding in theological traditions. The plaintiff's expert, Dr. Turner, testified that the plaintiff's belief has support in Old Testament understandings of the graven images prohibition. Such a basis is adequate to allow the claim to pass a test based on content.

Other authorities suggest that a functional test of a belief is more appropriate. See Note, 91 Harv. L. Rev. 1056, 1067. The Supreme Court of the United States appears to have gone some distance recently in adopting a functional test. In *Thomas v. Review Board,* supra, the court looked not to the content of the plaintiff's belief but to the role that the belief played in his life—the court looked more to whether there was a determination in the court below that there was an honest conviction held by the plaintiff coupled with activity in conformance therewith. *Id.,* at 715-716. The court cautioned, however, that there could be a belief "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.,* at 715. As such, there appears

to be a possibility that on the extreme peripheries of some beliefs, content may become a strong factor in determining whether a belief is religious. The plaintiff's belief does not fall within that periphery; evidence at trial shows that it is clearly within the ambit of traditional Judeo-Christian beliefs. The plaintiff's belief so sincerely held and her action in conformance therewith are thus entitled to First Amendment protection.

The defendants vigorously assert a position that the plaintiff's lack of membership in an organized religious body is fatal to any claim. They contend that a belief cannot be truly religious unless the believer has some association with a religious body, and without such a check on belief, the state would have no manner of knowing when a belief is truly religious and the extent of the belief. This claim must fail for at least two reasons. First, I believe that the plaintiff is a member of a religious organization. Her expert on religion testified that fundamentalist groups, such as the Pentecostal Church the plaintiff attends, frequently consider association to be the important facet of belonging to a group; formal membership is not required. Should it be necessary, I would easily be able to make a factual finding that the plaintiff's association with the Pentecostal group is membership. That her belief regarding the taking of photographs differs from that of the main body of members is of no import when determining whether a belief is protected by the First Amendment. See *Thomas v. Review Board,* supra, 450 U.S. at 715-76.

Second, I do not believe that formal membership is necessary to fall within the ambit of the First Amendment's protection. The focus of *Thomas v. Review Board,*

supra, is on the belief itself, not on the plaintiff's membership in any organization. Although "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests," *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972), it is not necessary to require actual membership in an organized body of believers to find that a belief is constitutionally protected. Beliefs will be found, under the functional test, to be nonreligious when there are clearly nonreligious motivations to the beliefs or asserted beliefs. The motivations bear on the sincerity of the belief and undoubtedly there will be difficulty in showing a pattern of behavior consistent with such a belief. In addition, bizarre claims may be scrutinized under a content test, thereby bringing the substance of a nonmember's belief into question. Furthermore, the fact that a belief is one within the ambit of First Amendment protection does not end the matter. The nature of the belief may well bear on the compelling nature of the state interest needed to require that the belief yield.

After a determination that the plaintiff's free exercise of religion is being burdened, the focus of my inquiry must turn to whether the state has demonstrated that it is serving a compelling state interest with the photograph requirement. See *Wisconsin v. Yoder*, supra, at 215. The evidence indicates at least three identifiable interests that the state seeks to advance as compelling: public safety on the streets and highways, security of financial transactions, and the administrative burden of an exception.

I do not accept the administrative burden of establishing an exception as a compelling state interest. To be compelling, a state's interest must represent "only the

gravest abuses, endangering paramount interest." *Sherbert v. Verner,* 374 U.S. 398, 406 (1963). As such, administrative inconvenience short of rendering an entire statutory scheme unworkable is not a compelling state interest. *Id.,* at 409.

The concerns about public safety and security of financial transactions have more appeal. It is almost without question that the state has a vital interest in being able to regulate adequately those driving on its highways. The potential for death and destruction from motor vehicles is great. To further a goal of ensuring that only those able to drive properly are on the roads, the state needs a form of identification. Experience prior to the photographic license indicated that the risk of counterfeiting and trading of licenses was at a level that the integrity of identification of drivers was in some doubt. Photographic licenses help to resolve this problem. In addition, the state has a vital interest in ensuring that alcoholic beverages are not sold to minors who in turn may be operating motor vehicles on the streets and highways while impaired by the effects of alcohol.

The security of financial transactions also rises to the level of a compelling interest. The statutes cited earlier illustrate a concern with the misuse of financial instruments. Many such misuses could be prevented by accurate identification of the maker of the instrument, and operator's license are a frequently used form of identification for these transactions. As the photographic license serves a purpose of more accurate identification, it furthers a vital state interest.

I find that the state has shown at least two compelling state interests.

Having found that the state has demonstrated two compelling state interests, my inquiry must now turn to whether the means employed represents the least restrictive alternative in achieving that end. *Thomas v. Review Board,* supra, 450 U.S. at 718. I find that the denial of a nonphotographic license to the plaintiff does not represent the least restrictive means available to accomplish the stated objective of protecting the state's compelling interests.

In looking to whether the means employed is the least restrictive alternative available, I think it wise to take note of the quality of the state interest involved. In some cases, one exception to a requirement may be tantamount to a total usurpation of the means employed to serve the compelling state interest. In *Sherbert v. Verner,* supra, 374 U.S. at 409, the court noted that an exception to a Sunday closing law was of such a nature; there simply was no less restrictive means. In other cases, a single exception to the statutory requirement or a small number of exceptions may not have a significant effect on how the state is able to serve its compelling interests.

The exception requested in this case does not have a significant effect on the state's ability to serve its compelling interests. The plaintiff's license, or the licensees who are likely to seek a similar exception, will not represent a significant impact on the system. The several exceptions to the photographic requirement already in effect somewhat weaken the compelling nature of the state interest. The plaintiff has demonstrated herself to be a competent driver. The state has come forward with no evidence that this plaintiff represents a threat to pub-

lic safety or the security of financial transactions. Indeed, inferences to the contrary abound.

My holding in this case in no way compels the defendants to issue nonphotographic drivers' licenses upon demand by anyone. In the appropriate case the state may deny such a request, where there is a true danger to the public safety or security. I make no intimation as to what level these concerns must rise before a valid free exercise claim must yield in the face of the state interest.

III.

The plaintiff seeks declaratory and injunctive relief from the strictures of the statute and attorney's fees. Before an injunction may issue in a § 1983 action, the plaintiff must show that she will suffer irreparable injury. *Allee v. Medrano,* 416 U.S. 802 (1974). In turn, the question of irreparable injury contains as a corollary notions of the lack of an adequate remedy at law.

Given the facts of this case, I believe that the plaintiff does not have an adequate remedy at law and that an injunction should issue against the defendants. The nature and the extent of the plaintiff's injury because of her inability to obtain a valid driver's license is not of the type that can readily be recompensed with legal remedies. While some of the plaintiff's injuries may be compensable by a monetary award in some court, the chilling effect on her exercise of her First Amendment rights is the type of injury properly redressed by equitable relief. *Scoma v. Chicago Board of Education,* 391 F. Supp. 459 (U.S. D.C. N.D. Ill. 1974).

Accordingly, an injunction will issue prohibiting the defendants from refusing to issue the plaintiff a valid Nebraska driver's license because of her refusal on religious grounds to have a photograph taken of her and placed on the license. Entry of judgment will be withheld pending resolution of the matter of attorney's fees.

IT HEREBY IS ORDERED that the plaintiff is given ten days from the date of this order to submit affidavits or other materials concerning the attorney's fee and costs to be awarded; the defendants' counsel shall may respond within ten days thereafter.

Dated October 15, 1982

BY THE COURT

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Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1105

Frances J. Quaring,

Appellee,

v.

Harry "Pete" Peterson, Director of the Department of Motor Vehicles, State of Nebraska; William Edwards, Deputy Director of the Department of Motor Vehicles, State of Nebraska,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

Submitted: October 10, 1983
Filed: March 1, 1984

Before BRIGHT, JOHN R. GIBSON, and FAGG, Circuit Judges.

BRIGHT, Circuit Judge.

Frances J. Quaring sought a Nebraska driver's license but refused to have her photograph taken and affixed to the license as required by Nebraska law. For this reason, Nebraska Department of Motor Vehicles officials Peterson and Edwards (Nebraska officials) refused Quaring's application for a driver's license. Quaring then brought suit against the Nebraska officials seeking to obtain a

court order requiring them to issue her a valid driver's license. She contended that her religious convictions prevented her from being photographed and that the refusal by the Nebraska officials to issue her a driver's license violated her first amendment right to the free exercise of her religion. The district court[1] agreed with Quaring's contention and enjoined the Nebraska officials from refusing to issue her a driver's license notwithstanding her refusal to be photographed.

The Nebraska officials bring this appeal, arguing that 1) the statute requiring driver's licenses to contain a photograph of the licensee does not burden Quaring's exercise of her religion, 2) that even if the photograph requirement burdens her religion, the state's interests outweigh that burden, 3) that no less restrictive alternative would adequately serve the state's interests, and 4) that excepting Quaring from the photograph requirement on the basis of her religion would violate the establishment clause. We reject these arguments, and affirm the district court.

I. *Background.*

Under Nebraska law, driver's licenses issued after January 1, 1978 must, with several exceptions,[2] contain a color photograph of the licensee. *See* Neb.Rev.Stat. § 60-

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[1]The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

[2]The statute does not require photographs of the licensee on learner's permits, school permits, farm machinery permits, special permits for those with restricted or minimal driving ability, and temporary licenses for Nebraska residents who are outside Nebraska when their licenses expire. Neb.Rev.Stat. § 60-406.04 (Reissue 1978).

406.04 (Reissue 1978). Quaring meets the requirements for obtaining a driver's license except that she refuses to allow her photograph to appear on her license. For this reason, she has been unable to obtain a driver's license.

Quaring's refusal to have her photograph taken is based on religious convictions. She believes in a literal interpretation of the Second Commandment, which states:

> Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.

Exodus 20:4; Deuteronomy 5:8. Quaring believes that the Commandment is violated by creating a likeness of God's creation. Quaring's belief extends beyond her refusal to allow her photograph to appear on her driver's license. She believes the Second Commandment forbids her from possessing any image having a likeness of anything in creation. She possesses no photographs of her wedding or family, does not own a television set, and refuses to allow decorations in her home that depict flowers, animals, or other creations in nature. When she purchases foodstuffs displaying pictures on their labels, she either removes the label or obliterates the picture with a black marking pen.

Although Quaring is not a member of an organized church, she considers herself a Christian and attends a Pentecostal church in a nearby town with her family. She also participates in nondenominational Bible study groups. According to Quaring, Pentecostals do not share her belief that the Second Commandment forbids the making of photographs or images. Rather, her belief stems principally from her own study of the Bible.

After unsuccessfully attempting to obtain an exemption from the photograph requirement, Quaring brought suit against the director and deputy director of the Nebraska Department of Motor Vehicles under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, alleging a deprivation of her right to the free exercise of religion. The district court ruled that the state's photograph requirement, as applied, violates Quaring's right to the free exercise of religion, and ordered Nebraska officials to issue her a driver's license.

II. *Discussion.*

Quaring's exercise of her religious beliefs directly conflicts with Nebraska's requirement that driver's licenses contain a photograph of the licensee. Although the photograph requirement plainly serves a legitimate and important state interest, it may not be applied in a manner that unduly burdens Quaring's free exercise of her religion. *See Thomas v. Review Board,* 450 U.S. 707, 717, 101 S.Ct. 1425, 1431, 67 L.Ed.2d 624 (1980). Before the state may refuse to issue Quaring a driver's license, "[I]t must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder,* 406 U.S. 205, 214, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1971).

A. *Quaring's Religious Beliefs.*

As a threshold requirement, Quaring must demonstrate that her refusal to be photographed is grounded upon a sincerely held religious belief. *See Stevens v. Berger,* 428 F. Supp. 896, 899 (E.D.N.Y. 1977). Although

a religious belief requires something more than a purely secular philosophical or personal belief, *Wisconsin v. Yoder, supra,* 406 U.S. at 215-16, 92 S.Ct. at 1533-34, courts have approved an expansive definition of religion. *See United States v. Seeger,* 380 U.S. 163, 165-66, 85 S.Ct. 850, 853-54, 13 L.Ed.2d 733 (1965) (test is whether "a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God"); *see also International Society for Krishna Consciousness, Inc. v. Barber,* 650 F.2d 430, 440 (2d Cir. 1981); *Founding Church of Scientology v. United States,* 409 F.2d 1146 (D.C. Cir.), *cert. denied,* 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969); *see generally* Freeman, *The Misguided Search for the Constitutional Definition of "Religion",* 71 Geo. L.J. 1519 (1983).

Quaring's beliefs, though unusual in the twentieth century, are religious in nature. The Second Commandment, the basis for her beliefs, expressly forbids the making of "any graven image or likeness" of anything in creation. Exodus 20:4; Deuteronomy 5:8. Quaring's refusal to allow herself to be photographed is simply her response to a literal interpretation of the Second Commandment, not unlike the response of the Old Order Amish to the Epistle of Paul to the Romans. In *Wisconsin v. Yoder, supra,* the Supreme Court noted that the daily life and religious practices of the Amish were a response to a literal interpretation of Paul's exhortation to "be not conformed to this world," and held that their refusal to send their children to school beyond the eighth grade was religious in nature. 406 U.S. at 216, 92 S.Ct. at 1533. *Cf. Stevens v. Berger, supra,* 428 F.Supp. at 902. Moreover, Quaring's literal interpretation of the Second Commandment

receives some support from historical and biblical tradition. At trial, Dr. John Turner, a professor of religious studies, testified that Quaring's beliefs can be analogized to the Hebrew concept that images of things in creation are an attempt to capture God and his creations, and that such an attempt is forbidden.[3]

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[3]In cases involving the religion clauses, courts sometimes cite authoritative works recognizing certain religious beliefs as supplemental evidence of the religious nature of a litigant's beliefs. *See, e.g., United States v. Seeger*, 380 U.S. 163 (1964); *Stevens v. Berger, supra*. Although the Nebraska officials do not seriously contest the sincerity and religious nature of Quaring's beliefs, we have briefly surveyed the literature discussing the Second Commandment's prohibition against the making of likenesses of God's creation.

The Commandments, including the Second Commandment, remain fundamental tenets of the Jewish (and the Christian) faith, as they were of the ancient Jewish faith, and within Judaism have been the subject of extensive interpretation and commentary. Some of that interpretation and commentary of the Second Commandment lends support to Quaring's personal interpretation. For example, included in early Hebrew religious beliefs were views prohibiting the reproduction of images:

> The Bible (ex. 20:4) forbade the "graven image" in the most explicit fashion, more categorically and comprehensively than the mere likeness. Hence, while the representation of human or animal figures on a plane surface was condoned or permitted most of the time during the periods in question, greater difficulties were constantly raised with regard to three-dimensional sculptures in the round. *Indeed, in some Orthodox circles, even making an impression with a seal bearing the human or animal form was considered religiously objectionable, since by doing so a man actually "made" a graven image, even though not for worship or veneration.* 14 Ency. Judaica 1059 (1971). (Emphasis added).

Even modern-day interpretation of Jewish law lends some support to views similar to Quaring's. Writing in a Hebrew-language publication, Rabbi Menashe Klein, Dean of Yeshiva Beth Shearim, Brooklyn, New York (a school for advanced Hebrew studies), argues that a person has a right to prevent

(Continued on following page)

Although members of the Pentecostal group with whom Quaring associates do not share her belief in a literal interpretation of the Second Commandment, that does not lessen the religious nature of her convictions. As the Supreme Court recently stated,

(The court expresses its appreciation to Professor Dov I. Frimer, Director, Institute of Jewish Law, Touro College School of Law, Huntington, New York, who supplied the court with the text and a translation of Rabbi Klein's Responsum.)

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow [adherent] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

(Continued from previous page)

others from taking his picture against his will. 7 RESPONSA MISHNE HALACHOTH § 114 (1977). Rabbi Klein observes that while the dominant position in Jewish law, as well as custom and practice, permits the photographing of human beings, an authortative, albeit minority, position prohibits photographs of humans, especially of the face. To support his position, Rabbi Klein cites the work of the noted Polish authority Rabbi Malkiel Zevi Halevi Tennenbaum, who in 3 RESPONSA DIVREI MALKI'EL § 58 (1897), opines that the taking of pictures violates the Second Commandment. Rabbi Klein also cites the work of the German scholar Rabbi Jacob Emden (1697-1776) in 1 RESPONSA SHE'ELAT YAVEZ § 170, who reports that his father, Rabbi Zevi Hirsch Ashkenazi, Chief Rabbi of Hamburg and later of Amsterdam, opposed any portraits of himself. Rabbi Klein concludes therefore, in his 1977 Responsum that one who, out of sincerity and piety, wishes to conduct himself in accordance with this stringent view of the Second Commandment may do so. Accordingly, others must respect that person's freedom of religious expression and refrain from taking his photograph against his wishes.

Thomas v. Review Board, supra, 450 U.S. at 715-16, 101 S.Ct. at 1430-31. Although Quaring's beliefs might seem unreasonably doctrinaire to many, that "does not mean that they can be made suspect before the law." *United States v. Ballard,* 322 U.S. 78, 87, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1943).

It is also clear that Quaring sincerely holds her religious beliefs. As the district court observed,

> At trial [Quaring] appeared ready to support her interpretation of the Bible, based on her knowledge of several portions of the Old Testament. In addition, [her] behavior in every way conforms to the prohibition as she understands it: her home contains no photographs, television, paintings, or floral-designed furnishings, and, as she testified, she goes so far as to remove or obliterate pictures on food containers.

Because Quaring's beliefs are based on a passage from scripture, receive some support from historical and biblical tradition, and play a central role in her daily life, they must be characterized as sincerely held religious beliefs.

B. *The Burden on Quaring's Religion.*

Having examined the religious nature and sincerity of Quaring's beliefs, we next turn to the question whether Nebraska's photograph requirement infringes upon those beliefs. Although the Nebraska officials correctly point out that the photograph requirement in no way compels Quaring to act in violation of her conscience, the Supreme Court has noted that "this is only the beginning, not the end, of our inquiry." *See Sherbert v. Verner,* 374 U.S. 398, 403-04, 83 S.Ct. 1790, 1793-40, 10 L.Ed.2d 965 (1963). Under the proper analysis, a burden upon religion exists when "the state conditions receipt of an important benefit

upon conduct proscribed by a religious faith, * * thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Board, supra,* 450 U.S. at 717-718, 101 S.Ct. at 1431-32.

Clearly, a burden upon Quaring's free exercise of her religion exists in this case. The state refuses to issue Quaring a driver's license unless she agrees to allow her photograph to appear on the license, a condition that would violate a fundamental precept of her religion. Moreover, in refusing to issue Quaring a driver's license, the state withholds from her an important benefit. Quaring needs to drive a car for numerous daily activities, which include managing a herd of dairy and beef cattle, helping her husband manage a thousand-acre farming and livestock operation, and working as a bookkeeper in a community ten miles from home. By requiring Quaring to comply with the photograph requirement, the state places an unmistakable burden upon her exercise of her religious beliefs.

The burden on Quaring is indistinguishable from the burden placed upon a Sabbatarian by the state in *Sherbert v. Verner, supra.* In that case, the Supreme Court held that in denying unemployment benefits to a member of the Seventh-Day Adventist Church who refused to work on Saturdays, the Sabbath of her faith, the state violated her right to the free exercise of religion. 374 U.S. at 402, 83 S.Ct. at 1792. Assessing the burden on the denial of benefits on the Sabbatarian's exercise of her religion, the Court commented,

> The [denial] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of

> her religion [not working on Saturdays] in order to accept work, on the other hand.

Id. at 404, 83 S.Ct. at 1794. Similarly, Nebraska's photograph requirement puts Quaring to the choice of following an important precept of her religion or foregoing the important privilege of driving a car.

C. *Balancing the State's Interest Against the Burden on Religion.*

Although Nebraska's photograph requirement burdens Quaring's exercise of her religious beliefs, that does not in itself entitle her to an exemption. Not all burdens upon religion violate the free exercise clause. *See, United States v. Lee,* 455 U.S. 252, 257-58, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1981). The state may justify a limitation on religious liberty by showing that it is the least restrictive means of achieving a compelling state interest. *Thomas v. Review Board, supra,* 450 U.S. at 718, 101 S.Ct. at 1432. In articulating the standard the state must meet, the Supreme Court has said that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder, supra,* 406 U.S. at 215, 92 S.Ct. at 1533.

The Nebraska officials argue that Quaring's interest in exercising her religion must be subordinated to the state's more compelling interest in requiring that driver's licenses contain a photograph of the licensee. In weighing the competing interests, we examine not only the substantial state interests that the photograph requirement generally serves, bu also whether an exemption to the requirement would impair the state's ability to achieve its objective. *Wisconsin v. Yoder, supra,* 406 U.S. at 221, 925

S.Ct. at 1536; *see also United States v. Lee, supra,* 455 U.S. at 259, 102 S.Ct. at 1056 (court must inquire whether accommodating exercise of religion will unduly interfere with fulfillment of government interest); L. Tribe, American Constitutional Law § 14-10, at 855 (1978) (crucial issue in free exercise cases is state's interest in denying exemption, not in maintaining underlying rule or program). To prevail, the Nebraska officials must demonstrate that their refusal to exempt Quaring from the photograph requirement serves a compelling state innterest.[4]

In justifying their refusal to grant Quaring an exemption to the photograph requirement, the Nebraska officials advance several state interests. First, they point out that by ensuring that only persons with valid driver's licenses operate motor vehicles, the state promotes a compelling interest in public safety. *Cf. Delaware v. Prouse,* 440 U.S. 648, 659, 99 S.Ct. 1391, 1399, 59 L.Ed.2d 5-660 (1979). They contend that only driver's licenses containing a photograph of the licensee can provide police officials with an accurate and instantaneous means of identifying a motorist. For this reason, at least 47 states require photographs of the licensee to appear on driver's licenses.[5] The

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[4]Three courts have considered claims by licensees who objected on religious grounds to similar photograph requirements. Two courts ruled that the state's refusal to exempt the objecting licensees served a compelling state interest. *See Dennis v. Charnes,* 571 F. Supp. 462 (D.Colo. 1983); *Johnson v. Motor Vehicle Div.,* 593 P.2d 1363 (Colo. 1979), and one court ruled that such a refusal does not serve a compelling state interest. *See Bureau of Motor Vehicles v. Pentecostal House,* 380 N.E.2d 1225 (Ind. 1978).

[5]Notably, however, one of the Nation's most populous states, New York, does not require photographs on driver's licenses.

Nebraska officials contend that an exemption to the photograph requirement would undermine the state's interest in ensuring that only licensed motorists drive on its roads.

Although quick and accurate identification of motorists surely constitutes an important state interest, we disagree wih the Nebraska officials' contention that the state's interest is so compelling as to prohibit selective exemptions to the photograph requirement. Indeed, Nebraska law already exempts numerous motorists from having a personal photograph on their license. At trial, the associate director of the Department of Motor Vehicles testified that photographs of the licensee are not required on learner's permits, school permits issued to farmers' children, farm machinery permits, special permits for those with restricted or minimal driving ability, or temporary licenses for individuals outside the state whose old licenses have expired. In addition, motorists licensed in the few states that do not require photograph licenses presumably drive through Nebraska on occasion, and those persons would be unable to present driver's licenses containing their photographs. Because the state already allows numerous exemptions to the photograph requirement, the Nebraska officials' argument that denying Quaring an exemption serves a compelling state interest is without substantial merit.

The Nebraska officials also argue that the state's compelling interest is ensuring the security of financial transactions justifies their refusal to exempt Quaring from the photograph requirement. Again, we disagree. Although a photograph license obviously serves an important state interest in facilitating the identification of persons writing checks or using credit cards, granting Quar-

ing an exemption will not undermine that interest. Many people already engage in financial transactions without the benefit of a photograph license for identification: some are exempt from the photograph requirement, and some do not have any license because they do not drive. Issuing Quaring a license without her photograph places her in the same position as these people. In any event, the state may still achieve its interest in ensuring the security of financial transactions because people may freely refuse to do business with Quaring if she is unable to present adequate identification.

Finally, the Nebraska officials argue that the administrative burden of considering applications for exemptions from the photograph requirement also constitutes a compelling state interest. They point out that establishing uniform criteria for granting exemptions will be difficult because 95 testing centers in Nebraska issue driver's licenses. They also argue that the religious nature of the claimed exemption will exacerbate this problem. The state would have to probe into the sincerity and religious nature of an applicant's belief, and applicants could easily show religious grounds as the basis for their objection to the photograph requirement. The Nebraska officials fear that unless the state establishes an elaborate and expensive mechanism to consider requests for religious exemptions, exemptions to the photograph requirement will be available virtually on demand.

Although Nebraska plainly has an interest in avoiding the administratively cumbersome task of considering applications for religious exemptions, its interest is not compelling. A state's interest in avoiding an administrative burden becomes compelling only when it presents adminis-

trative problems of such magnitude as to render the entire statutory scheme unworkable. *See Sherbert v. Verner, supra,* 374 U.S. at 408-09, 835 S.Ct. at 1796-97. The record contains no evidence, however, that allowing religious exemptions to the photograph requirement will jeopardize the state's interest in administrative efficiency. Persons seeking an exemption from the photograph requirement on religious grounds are likely to be few in number. Indeed, few persons will be able to demonstrate the sincerity of their religious beliefs by showing that they possess no photographs or pictures. Furthermore, the few persons who make legitimate requests for exemptions from the photograph requirement will cause the Nebraska officials little inconvenience. Because persons requesting an exemption for religious beliefs based on the Second Commandment can easily demonstrate the sincerity and valid nature of their belief as Ms. Quaring offered to do, the state need not be greatly burdened by requests for an exemption. At least on this record, the Nebraska officials have not demonstrated that giving an exemption for photographs to Quaring and others holding similar beliefs will cause any undue administrative burden. Thus, none of the interests the Nebraska officials advance are sufficient to justify the burden upon Quaring's religious liberty.

D. *Establishment of Religion.*

The Nebraska officials argue that providing an exemption for Quaring on the basis of her religion creates an impermissible establishment of religion. We disagree. In some cases, the free exercise clause requires a state to make a reasonable accommodation of religion. *See O'Hair v. Andrus,* 613 F.2d 931, 935 (D.C. Cir. 1979).

Such accommodation does not constitute an establishment of religion. *See Thomas v. Review Board, supra*, 450 U.S. at 719-20, 101 S.Ct. at 1432-33; *Sherbert v. Verner, supra*, 374 U.S. at 409, 835 S.Ct. at 1796.

III. *Conclusion.*

Accordingly, for the reason set forth in this opinion, we affirm the district court's issuance of an injunction requiring the Nebraska officials to issue Quaring a driver's license without requiring her to be photographed.

FAGG, Circuit Judge, dissenting.

I respectfully dissent. The interest advanced by the state statute is, in my opinion, of sufficient magnitude to justify an indirect burden on Quaring's free exercise of religion. The majority, while recognizing that a photographic license requirement "plainly serves a legitimate and important state interest," concludes that granting Quaring special dispensation from the requirement will not unduly hinder the state's accomplishment of its legitimate objective. I cannot agree.

Nebraska's photographic license requirement advances the state's interest in public safety on the streets and highways by providing police officers in the field with an accurate and instantaneous means of identifying motorists. Significantly, a police officer arriving at the scene of an accident or stopping a vehicle in connection with a traffic violation or suspected criminal activity is assured that the individual displaying the license is in fact the individual to whom the license was issued. As noted in the majority opinion, the fact that 47 of 50 states require a photographic driver's license indicates the unique advantage derived from this instantaneous identifier.

The majority does not attempt to advance any less restrictive means of accomplishing the state's compelling interest in "quick and accurate identification of motorists." Rather, the majority states that in weighing the competing interests involved, it is necessary to consider whether granting "selective exceptions" to the state's requirement would impair the state's ability to achieve its objective. This approach simply ignores or casts aside the state's legitimate interest in assuring instantaneous identification for all of its regular license holders. I am convinced that accommodation of Quaring's religious practice by issuance of a driver's license lacking a photographic identifier would "unduly interfere with fulfillment of the governmental interest." *United States v. Lee*, 455 U.S. 252, 259 (1982). "The ready certainty inherent in photographic identification would be lost." *Johnson v. Motor Vehicle Division*, 593 P.2d 1363, 1365 (Colo. 1979). To downplay the impact of granting selective exemptions to regular license holders, the majority attaches significance to the fact that Nebraska exempts certain categories of permittees and temporary licensees from the photograph requirement; however, the limitations placed upon these provisional operators deny any meaningful comparison with the state's regular license holders.

I have no quarrel with the majority's observation that Quaring may experience daily inconvenience because she cannot drive a motor vehicle. Her difficulties, however, are not insurmountable and she is not the only person that has been faced with the need to make life-style adjustments precipitated by nonconformity with driver's license requirements. Not insignificantly, and as the majority notes, Quaring's religious beliefs are "unusual in the twentieth century" and "the photographic require-

ment in no way compels Quaring to act in violation of her conscience." I cannot say that the state's legitimate requirement of a photographic identifier has placed impermissible pressure on Quaring to modify her behavior and violate her beliefs to the end of obtaining driving privileges upon the roadways of Nebraska.

"[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference. • • • Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in • • • disadvantage to some religious sects • • •." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). In my view the state's compelling interest in having a photographic verification of identifying upon its driver's licenses outweighs the incidental burden on Quaring's free exercise of religion. This is an instance where a religious belief must yield to the common good. I would reverse.

APPENDIX C

NEB.REV.STAT. §60-406.04 (Supp. 1982)

60-406.04. Operator's licenses; color photograph affixed; procedure; costs; temporary motor vehicle operator's permits; when issued; fee; period valid; renewal.

(1) All motor vehicle operator's licenses except limited, special, learners', temporary as provided by subsections (2) and (3) of this section and subsection (4) of section 60-415, or school permits issued in the states after January 1, 1978, shall have a color photograph of the licensee affixed thereto. Such license shall be issued by the county treasurer either in person or by mail. The Director of Motor Vehicles shall negotiate and enter into a contract to provide the necessary equipment, supplies, and forms for the photographs. All costs incurred by the department under this section shall be paid by the state out of appropriations made to the Department of Motor Vehicles. All costs of taking and affixing the photographs shall be paid by the county from the fees provided pursuant to section 60-409.

(2) Any person who, at the time of renewal of his or her motor vehicle operator's license, is out of the state, but within the United States, may apply for a Class I temporary motor vehicle operator's permit. Such application shall be made to the county treasurer of the county in which the applicant resides. Upon being satisfied that such application is in proper form, the county treasurer shall issue, upon the payment of a fee of two dollars, a temporary motor vehicle operator's permit. The temporary permit shall be valid for no longer than three months from the date of expiration of the individual's motor ve-

hicle operator's license, except that a person who is out of the state continually for more than three months may apply for an extension of the temporary permit for up to three additional three-month periods at no charge.

(3) Any person who, at the time of renewal of his or her motor vehicle operator's license, is temporarily residing in a foreign country, may apply for a Class II temporary motor vehicle operator's permit. Such application shall be made to the county treasurer of the county in which the applicant resides. Upon being satisfied that such application is in proper form, the county treasurer shall issue, upon the payment of a fee of two dollars, a temporary motor vehicle operator's permit. The temporary permit shall be valid for no longer than one year from the date of expiration of the individual's motor vehicle operator's license. A person who is out of the United States continually for more than one year may apply for an extension of such temporary permit for up to three additional one-year periods at no charge.

(4) Any person possessing a permit pursuant to subsection (2) of this section on March 25, 1982, may apply for renewal of such temporary permit as provided in subsection (3) of this section.